SUPREME COURT U. S.
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JAMES H. MCKENNEY,
Clerk.

No. 109.

Motion to dismiss or affirm

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Jan. 19, 1900.

No. 109.

JAMES BRISTOL, as Executor of the Last Will and Testament of Sophia M. Bristol, Deceased, Plaintiff in Error,

vs.

WASHINGTON COUNTY, STATE OF MINNESOTA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

MOTIONS OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

George H. Sullivan,
Moses E. Clapp,
Counsel for Defendant in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

JAMES BRISTOL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SOPHIA M. BRISTOL, DECEASED, PLAINTIFF IN ERROR,

vs.

WASHINGTON COUNTY, STATE OF MINNESOTA.

MOTIONS TO DISMISS OR AFFIRM.

Now comes the defendant in error in the above-entitled cause and respectfully moves the court to dismiss the writ of error and affirm the judgment of the circuit court for the following reasons:

This court has no jurisdiction to review the decision of the circuit court in the case at bar. Its jurisdiction is invoked by the plaintiff in error upon the grounds that it falls within the provisions of section 5 of the act of March 3, 1891. The language of that act important to quote here is as follows:

"In any case that involves the construction or application of the Constitution of the United States * * * in any case in which the constitution or the law of a State is claimed to be in contravention of the Constitution of the United States."

Plaintiff in error, in its answer after this matter was removed from the probate court of Minnesota to the circuit court, set up that the *tax proceeding* was in violation of the Federal Constitution; that it deprived the plaintiff in error of property without due process of law; that it was a taking for a public use without compensation; that it was in violation of the fourteenth amendment of the Constitution (Record, p. 34).

While these allegations exist in the answer, we challenge the record to show the claim that any law of Minnesota contravenes the Federal Constitution as even a colorable claim.

The facts stated very briefly are: Sophia M. Bristol, the testatrix of plaintiff in error, loaned money in Minnesota through an agent who invested, collected, and reinvested the same in such a manner as to constitute the same a permanent business and investment in Minnesota. Such agent had power to invest, collect, and reinvest all loans and investments. Defendant in error contended that such course of business and investment gave such property a situs in Minnesota and subjected such property to taxation in Minnesota. When Sophia M. Bristol died her estate was probated in Minnesota, and defendant in error filed its claim for taxes in said probate court, and plaintiff in error then removed the matter of said claim to the circuit court. That court determined that the course of business gave such property a situs for taxation in Minnesota, and that the claim was valid, and allowed the same against said estate. That was the only question determined by the court (page 38, folio 70, Record), and the only question necessary to the determination of the case.

Thereupon plaintiff in error removed the cause to this court by writ of error.

While the answer filed by plaintiff in error contained the allegations we have referred to, we submit that the record fails to show the existence of any statute of Minnesota re-

lied on by defendant in error which contravenes any provisions of the Federal Constitution. We insist that it is not enough to merely set up a claim under the Federal Constitution, but the record must show that some law of the State is in contravention of the Constitution, the claim must be a colorable claim (Penn. Mutual Life Ins. Co. *vs.* Austin, 168 U. S., 685–695).

We submit that no attempt has been made to show that such is the fact in the case at bar, nor do we think the assignments of error raise the question, the assignments of error being pages 54 and 55, Record.

Nor does the answer filed by plaintiff in error help him. It is first claimed that the law of Minnesota is in violation of the constitution of the *State of Minnesota*, and it is then claimed that the *assessment, levy, and collection of the taxes* is in contravention of the Constitution of the United States (Record, p. 34). No law of Minnesota is claimed to be in violation of the Federal Constitution, nor is our contention a technical one, for the record and brief of plaintiff in error show that the real contention is the court's construction of law and determination of fact.

An examination of the assignments fails to show any statute or law of Minnesota which it is claimed contravenes the Federal Constitution, nor does the record disclose elsewhere that complaint was made of any statute having that effect, and the most that can be said of the decision itself is where it recites that "the Law of Minnesota, chapter 11, section 1, which provides that all real and personal property in the State is subject to taxation is certainly broad enough to include personal property of every kind belonging to non-residents having a situs in the State of Minnesota" (page 39 of the Record). Certainly this does not bring it within the act of 1891.

In short, the issue was one of mixed law and fact—first, whether the property had a situs in Minnesota; second, whether the laws of Minnesota applied to and taxed that

class of property. The cases cited by plaintiff in error in support of jurisdiction we think do not apply.

The case of Dewey *vs.* Des Moines, 173 U. S., 193, was the case where a statute of Iowa authorized an assessment upon real estate for local improvements and made such assessment a personal judgment against non-resident owners without notice or service of process.

The case of Savings Society *vs.* Multnomah County, 169 U. S., 421, was one in which it appears from the record that the statute of such State was directly assailed as contravening the Constitution of the United States.

In the case at bar, as we have already suggested, no statute has been pointed out as contravening the Federal Constitution. The question at bar is, was the property in the State of Minnesota? If it was, then the right of Minnesota to tax it is unquestioned and the method of taxation not the subject of review here. The court found that the property had acquired a situs in Minnesota. It is that letermination which the plaintiff in error seeks to reverse. It is that determination which he complains of, and his remedy should, we think, have been by appeal to the circuit court of appeals, and we respectfully submit that our motion to dismiss or affirm should be granted.

GEORGE H. SULLIVAN,
MOSES E. CLAPP,
Counsel for Defendant in Error.